Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

Sidney J. Brown, *et al.*,

Petitioners,

v.

Resolution Trust Corporation,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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June 2, 1997

82 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a citizen has standing to seek judicial relief against the Resolution Trust Corporation where the Resolution Trust Corporation wrongfully excluded that person from bidding on notes secured by property he owned?

Whether a citizen's constitutional rights of due process are violated where that person is left entirely without a remedy for injuries caused by the Resolution Trust Corporation?

Whether the U.S. Court of Appeals for the District of Columbia's decision, which strips a private citizen of all remedies for the Resolution Trust Corporation's wrongful conduct, is inconsistent with U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996) and South Carolina v. Regan, 104 S.Ct. 1107 (1984)?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This petition seeks review of an unpublished per curiam decision of the United States Court of Appeals for the District of Columbia. The parties to that proceeding were:

Plaintiffs-Appellants:

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederic K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation.[1]

Defendants-Appellees:

Federal Deposit Insurance Corporation as successor to Resolution Trust Corporation.

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[1] Mid City Redevelopment Corporation is a stand-alone company and has no parent companies or subsidiaries.

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OPINION BELOW

Review is sought of an unpublished per curiam decision by the U.S. Court of Appeals for the District of Columbia, Brown et al v. Resolution Trust Corporation, Docket No. 96-5075 (D.C. Cir. January 2, 1997). The full text of the decision is set out in Appendix 1.

STATEMENT OF JURISDICTION

A panel for the U.S. Court of Appeals for the District of Columbia filed the decision which is the subject of this petition on January 2, 1997. The case was argued before a three judge panel consisting of Judges Silberman, Henderson and Buckley.

The same court denied a petition for rehearing and suggestion for rehearing en banc March 4, 1997. (Appendix 2).

This petition is filed within 90 days of the U.S. Court of Appeals for the District of Columbia's denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The principal statutes involved in this case are the Financial Institution Report, Recovery and Enforcement Act of 1989 ("FIRREA") 12 U.S.C. § 1441a, the relevant portions of which are set out in Appendix 5, and 12 U.S.C. § 1821, the relevant portions of which are set out in Appendix 6.

STATEMENT OF THE CASE

I. The Nature of the Case

A. Introduction

The U.S. District Court for the District of Columbia granted the Resolution Trust Corporation's ("RTC") Motion to Dismiss the Complaint of Sidney J. Brown and Saul H. Bernstein, individually and as partners of Nattchase Associates Limited Partnership ("Nattchase") and Mid City Redevelopment Corporation (hereinafter collectively "Brown"). Despite its assumption that the RTC in fact committed wrongful acts against Brown, the Court of Appeals for the District of Columbia affirmed the district court's dismissal.

Brown's Complaint arose from actions of the RTC that intentionally denied Brown the right to bid on a note secured by property which he already owned and in which he had invested over $30 million. As a direct result of the RTC's actions, Brown lost his property and his $30 million investment. Brown's Complaint includes claims for monetary and declaratory relief.

As discussed below, Brown's claims reached the D.C. Circuit as a result of the Court of Appeals for the Fourth Circuit's ruling that, after Brown exhausted the RTC's administrative remedies, he would be entitled to de novo judicial review of his claims. Accordingly, after exhausting the RTC's administrative remedies, Brown initiated the district court action. In plain disregard of the Fourth Circuit's decision, however, the district court refused to give Brown the de novo review provided by statute and promised by the Fourth Circuit and summarily dismissed

Brown's Complaint. In dismissing Brown's Complaint, and in affirming that dismissal, the district court and the D.C. Circuit have adopted the RTC's position that it is immune from any liability under any circumstances.

The D.C. Circuit's decision undermines over 20 years of federal court precedent recognizing the standing of a disappointed bidder to recover damages from a federal agency. If the RTC is allowed to violate the law in excluding Brown from bidding on notes secured by property he owned, and he does not have standing to challenge the RTC's conduct, then no disappointed bidder has standing.

B. Facts

On June 20, 1988, Plaintiff Nattchase purchased from Sajacito, Inc. ("Sajacito") properties in Loudoun County, Virginia known as "Nattak" (72 acres) and "Steeplechase" (250 acres) (collectively, the "Properties") for a price of $45,000,000. Nattchase paid $9,000,000 in cash at settlement, plus closing costs, and financed the balance of the purchase price by a $36,000,000 deferred purchase money note and deed of trust provided by Sajacito, which was wholly owned by San Jacinto Savings Association ("San Jacinto"), a federal savings and loan, which in turn was owned by Southmark Corporation ("Southmark"). None of these entities ever advanced any monies to Brown. Since purchasing the Properties, Nattchase has paid a total of $15,000,000 in principal and interest, $1,500,000 in real estate taxes, at least $6,000,000 to develop the Properties, and has incurred other costs for a total out-of-pocket investment of over $32,000,000. As recently as six months prior to the RTC's May 5, 1993 sale of the note to CMF

Loudoun, L.P. ("CMF"), Brown paid the RTC approximately $500,000 on account of interest due.

The RTC assumed control over and became responsible for San Jacinto as a failed institution and succeeded to the interest of San Jacinto, including an assignment of Nattchase's deed of trust and note held by Sajacito. After commencing to make payments, Nattchase failed to make certain principal and interest payments on its note as a result of the depression in the commercial real estate market, and also as a result of actions by Southmark, Sajacito and/or San Jacinto that prevented the intended development of the Property. Based upon representations and omissions of material facts by San Jacinto, Sajacito and/or Southmark, Nattchase purchased the Properties with the expectation and intent that the Nattak site could be developed as a regional shopping center. Upon information and belief, Southmark, Sajacito and/or San Jacinto conspired with others in a scheme to prevent Nattchase from developing Nattak as a regional shopping center in favor of another Southmark property near the Nattak site.

The RTC "packaged" the Nattchase note for sale in a "pool" with two other notes that were unrelated to the Properties owned by Nattchase and as to which Nattchase had no legal or financial relationship. The bidding package offered by the RTC barred Nattchase and its principals or affiliates from bidding on any of the notes in the pool on the ground that Nattchase was the principal on the note secured by the Properties.

The RTC proceeded to sell the "package" of notes to CMF for a price of $14,000,000, of which approximately $5,000,000 is allocable to the Properties. In other words, the RTC received about 10% of the amount due on the

Nattchase note. CMF refused to negotiate a settlement with Brown and immediately moved to foreclose on the Properties. The RTC's exclusion of Brown from the bidding process, in addition to the actions of Southmark, Sajacito and/or San Jacinto that prevented the intended development of the Properties, effectively took from Brown his substantial investment in the Properties. The RTC sold the note for a fraction of the amount which would have been offered by Brown if allowed to bid at a time when the RTC knew or should have known that CMF or any other purchaser planned to foreclose on the Properties.

From January 1990 until the present action was filed, Brown has made numerous proposals to settle or resolve, in whole or in part, Nattchase's obligations under the note securing the Properties. Face-to-face negotiations were conducted and correspondence exchanged between Brown and San Jacinto and the RTC. By letter dated August 18, 1993, Brown formally objected to the RTC's illegal and unconstitutional actions in refusing to allow Brown to bid on the Properties and requested that the RTC set aside the sale and readvertise for bids. Brown also advised the RTC that the financial consequences of its actions were a loss of investment costs and opportunities of over $30,000,000. The RTC responded by letter dated September 8, 1993, stating that "[a]ny further issues" must be raised with the purchasers of the note, i.e., CMF, and that the RTC "no longer maintains any right, title, or interest in the loan."

The deferred purchase money note and deed of trust provided to Nattchase by Southmark, San Jacinto and/or Sajacito with respect to the Properties at issue was and is the only financial transaction between Nattchase and its individual principals and Southmark, San Jacinto and/or Sajacito. Brown intended to submit a bid for the notes at

issue, but had not determined the source of financing as of the time that the RTC barred Brown from bidding. Therefore, Brown did not propose to purchase the assets in the pool in whole or in part through the use of the proceeds of a loan or advance of credit from the RTC or from any institution subject to the jurisdiction of the RTC under its enabling legislation.

II. Course of the Proceedings Below

1. District Court - Eastern District of Virginia

On November 19, 1993, Brown filed a Complaint in the U.S. District Court for the Eastern District of Virginia seeking injunctive relief, declaratory judgments and monetary and punitive damages, and also filed a motion for a temporary restraining order and preliminary injunction.[2]

On November 19, 1993, the same day that the Complaint was filed, the parties appeared before the district court for a hearing on Brown's application for a TRO. In its order of November 19, 1993, the District Court denied Brown's application for a TRO and preliminary injunction and, although the district court recognized the continued viability of certain of Brown's causes of action, it dismissed Brown's Complaint with prejudice.

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[2] Specifically, Brown sought an injunction which would: 1) enjoin the foreclosure sale of the Properties scheduled for November 22, 1993; 2) set aside the sale of the note to CMF; and 3) require the RTC to resolicit bids on the note and allow Brown to participate upon the same terms as the other bidders.

2. U.S. Court of Appeals for the Fourth Circuit

On December 17, 1993, Brown filed with the U.S. Court of Appeals for the Fourth Circuit a timely notice of appeal from the district court's order of November 19, 1993. On July 25, 1994, the Fourth Circuit issued its unpublished per curiam Opinion on the appeal. (Appendix 3).

The Fourth Circuit first addressed Brown's claims for monetary and declaratory relief against the RTC.[3] Citing 12 U.S.C. §§1821(d)(13)(D) and (d)(6)(A), the Fourth Circuit determined that claimants such as Brown were required to submit their claims against the RTC, including claims for declaratory judgment, to the administrative claims process before seeking judicial review. The Fourth Circuit stated:

> This exhaustion requirement applies to claims arising both before and after RTC's appointment as receiver, [citation omitted], and to declaratory judgment actions. See Henderson v. Bank of New England, 986 F.2d 319, 321 (9th Cir.) (§ 1821(d)(13)(D) "bars judicial review of any non exhausted claim, monetary or nonmonetary, which is 'susceptible of resolution through the claims procedure'"), [citation omitted].

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[3] The Fourth Circuit described Brown's Complaint as including the following claims: 1) declaratory judgment against the RTC; 2) rescission of the contract of sale for the note; 3) judgment requiring another bidding process; 4) injunctive relief against CMF's scheduled foreclosure; and 5) monetary damage claim against the RTC.

(emphasis supplied).

The Fourth Circuit found that Brown had failed to exhaust his administrative remedies, without addressing the merits of Brown's monetary and declaratory claims. The Fourth Circuit held that the exclusion of Brown from bidding on the notes may have been an "erroneous determination by the RTC as to permissible bidding participants," but that "Brown must first pursue his claims under FIRREA's administrative scheme."

The Fourth Circuit acknowledged that the district court had erred in its dismissal with prejudice of Brown's claims for declaratory and monetary relief and therefore ruled:

> [W]e find that the district court properly dismissed Brown's claims against RTC, pending presentation of his claims to RTC under the statutory administrative procedures. However, consistent with the RTC's concession, we modify that disposition to reflect a dismissal without prejudice of Brown's claims against RTC, so that Brown may indeed pursue his claims according to the statutory scheme.

(emphasis supplied).

The final paragraph of the Fourth Circuit's decision summarizing its disposition of Brown's appeal reads in its entirety:

> For the reasons stated herein, we affirm the district court's dismissal with prejudice of Brown's claim against CMF, and its denial

> of injunctive relief. We modify the dismissal of Brown's claims against the RTC to reflect a dismissal without prejudice, and affirm that disposition. Finally, we affirm the district court's denial of Brown's Rule 60(b) motion.

(emphasis supplied). In sum, the Fourth Circuit could not have been more clear that the only claims dismissed with prejudice were Brown's claims against CMF and Brown's claims for injunctive relief. Brown's claims against the RTC for both monetary and declaratory relief were dismissed without prejudice, giving rise to Brown's statutory right to de novo review by the U.S. District Court for the District of Columbia after exhaustion of the RTC's administrative procedures.

On August 5, 1994, Brown filed with the Fourth Circuit a petition for rehearing and a suggestion for rehearing en banc. Both the petition and suggestion were denied without opinion on August 19, 1994.

3. U.S. Supreme Court

On November 15, 1994, Brown filed a petition for a writ of certiorari with the Supreme Court. Brown's petition was denied without opinion on February 21, 1995.

4. The RTC's Administrative Procedures

On or about November 29, 1993, during the pendency of Brown's action in the United States District Court for the Eastern District of Virginia, the RTC mailed to Brown "Proof of Claim" forms with regard to Brown's claims against the RTC. Brown timely filed the forms as

requested by the RTC, while explicitly preserving his rights and remedies. By letter dated January 10, 1995, and received by Brown on January 17, 1995, the RTC disallowed Brown's claims and advised Brown that an action may be brought "on or prior to March 13, 1995 ... in the ... United States District Court for the District of Columbia."

5. District Court - District of Columbia

Brown then filed suit in the U. S. District Court for the District of Columbia on February 17, 1995, seeking de novo review of Brown's claims for declaratory and monetary relief which had been disallowed by the RTC. Brown's action contained three counts. In Count I, Brown asked the court to issue a judgment declaring that the RTC's sale of the notes to CMF was illegal, null and void. In Count II, Brown sought money damages based upon the RTC's violation of Brown's constitutional rights.[4] In Count III, Brown sought money damages based upon the RTC's illegal and otherwise wrongful exclusion of Brown from bidding on the notes. Jurisdiction over Brown's action was expressly predicated on 12 U.S.C. §1821(d)(6).

On May 17, 1995, the RTC filed a motion to dismiss Brown's action. On February 14, 1996, the district court entered an order granting the RTC's motion and dismissed Brown's action with prejudice. With regard to Count I, the court held that, based upon the Fourth Circuit's decision concerning Brown's previous request to have the sales agreement with CMF rescinded, the doctrine of res judicata barred Brown's request for a declaratory judgment.

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[4] Brown does not challenge in this petition the district court's ruling with regard to Count II of his Complaint.

With regard to Count III, the court made alternative rulings. First, the court held that, whereas 12 U.S.C. §1441a(a)(f)(1) specified certain persons that may not bid on properties held by the RTC, Congress otherwise granted the RTC complete discretion to exclude from bidding any other persons. In the alternative, the court held that, even assuming arguendo that Brown's exclusion from bidding was illegal, Brown lacked standing to seek judicial relief.

6. U.S. Court of Appeals for the District of Columbia

Brown timely appealed the district court's dismissal of his Complaint to the Court of Appeals for the District of Columbia. The D.C. Circuit assumed, without deciding, that Brown could prevail against the RTC on a claim of wrongful exclusion from bidding. Nonetheless, the D.C. Circuit concluded that Brown lacked standing because he could not obtain any redress for any of the injuries caused by the RTC's actions. With regard to Brown's claims for declaratory relief, the D.C. Circuit held that the Fourth Circuit's dismissal of Brown's claims for injunctive relief was res judicata as to the declaratory relief sought. With regard to Brown's monetary claims, the D.C. Circuit held that these claims were too speculative.[5]

In sum, the D.C. Circuit left Brown entirely without a remedy despite its assumption that the RTC had wrongfully excluded Brown from bidding.

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[5] Additionally, as will be discussed in more detail below, the D.C. Circuit simply overlooked certain of Brown's monetary claims.

REASONS FOR ALLOWING THE WRIT

I. Introduction

The tortuous path of Brown's claims against the RTC has reached an impasse that is as improbable as it is unfair. The Fourth Circuit ruled that Brown must exhaust his administrative remedies before seeking de novo review in the appropriate federal court. The Fourth Circuit thus dismissed Brown's claims without prejudice.

Brown did exactly as the Fourth Circuit directed. Predictably, of course, the RTC denied Brown's administrative claims against the RTC. Despite Brown's statutory right to de novo review of the merits of his claims, the district court ruled that Brown's claims for declaratory relief were barred by the doctrine of res judicata and that Brown does not even have standing to seek money damages for the RTC's wrongful conduct. The D.C. Circuit affirmed this ruling. Brown, in other words, has no remedy despite the ruling of the Fourth Circuit and the statutory guarantee of de novo review. See 12 U.S.C. § 1821(d)(6).

The reasons for allowing the Writ are threefold. First, Brown has standing to seek judicial relief for the RTC's wrongful conduct. Not only is the D.C. Circuit's decision in direct contravention of the Fourth Circuit's previous ruling in this matter, but it ignores the statutory scheme enacted by Congress, the rules for standing pronounced by this Court, and this Court's recent decision in U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996). Second, the D.C. Circuit's decision leaves Brown entirely without a remedy for injuries the court assumed were caused by the RTC's wrongful conduct. As such, the D.C. Circuit's decision

results in a deprivation of Brown's due process rights. The D.C. Circuit's decision in this respect is in conflict with its own previous decisions, the previous decisions of this Court, and previous decisions of other circuit courts of appeal.

Third, the D.C. Circuit's decision has more far reaching and dangerous ramifications than simply the unjust consequences for Brown. The D.C. Circuit has effectively held that a federal agency can violate federal law, inflict damage upon a private citizen, and yet be completely immune from suit. Nothing in the D.C. Circuit's decision would restrict its application to Brown or to the RTC (FDIC). Without any rational basis or support, the D.C. Circuit has created and conferred upon all federal agencies a license to injure any private citizen without fear of recourse.

For these reasons, Brown respectfully requests that this Court allow this writ.

II. Brown Has Standing To Seek Judicial Relief For The RTC's Wrongful Exclusion Of Brown

FIRREA contains express provisions which allow persons in Brown's situation to bring a claim against the RTC in federal district court and to receive de novo judicial review of that claim. 12 U.S.C. §1821(d)(6)(A). Several circuit courts of appeal, including the D.C. Circuit, have previously held that this provision affords a claimant de novo judicial review of his claims against the RTC. See e.g., Freeman v. F.D.I.C., 56 F.3d 1394, 1395 (D.C.Cir. 1995); Bueford v. R.T.C., 991 F.2d 481, 486 (8th Cir. 1993); Telematics International, Inc. v. NEMLC Leasing Corp., 967 F.2d 703, 705 (1st Cir. 1992); Rosa v. R.T.C.,

938 F.2d 383, 396 (3d Cir. 1991).[6] Thus, based on the statutory scheme enacted by Congress, Brown has standing to pursue his claims against the RTC.

In the alternative, Brown argued in both the district court and the D.C. Circuit that an implied private right of action existed under FIRREA for the RTC's illegal conduct. Under 12 U.S.C. §1441a(a)(14)(B)(viii), the RTC is required to promulgate, as part of its strategic plan for conducting its functions and activities, "[s]tandards for adequate competition and fair and consistent treatment of offerors." Moreover, pursuant to 12 U.S.C. §1821(d)(13)(E)(iii), the RTC is dutybound to "conduct its operations in a manner which ... ensures adequate competition and fair and consistent treatment of offerors." These provisions, among others, confer upon Brown a private right of action against the RTC for its wrongful

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[6] It is noteworthy that, in the Fourth Circuit, the RTC championed FIRREA's de novo review provisions. In its Brief before the Fourth Circuit, the RTC stated:

> In regard to the district court's dismissal with prejudice, the RTC notes that 12 U.S.C. §1812(d)(7)(A) (sic) establishes a claimant's right to de novo judicial review of the receiver's final determination. Thus, in order to insure Brown's statutory right to de novo review, after he completes FIRREA's claims process...the dismissal of any allowable claims for monetary or non-monetary relief against the RTC should be without prejudice.
>
> * * * *
>
> Brown has filed a claim with the RTC, which the RTC is considering. If the RTC fails to grant the claim, FIRREA will allow Brown to file suit against the RTC.... [6]

exclusion of Brown from bidding on RTC-owned property. See Cort v. Ash, 95 S.Ct. 2080 (1975).

In its decision affirming the district court's dismissal, the D.C. Circuit simply opted not to address either 12 U.S.C. § 1821(d)(6)(A) or Brown's implied private right of action argument. Instead, the D.C. Circuit ruled that Brown could not obtain redress for any injury caused by the RTC's actions.[7] (Appendix 1). Remarkably, in so ruling, the D.C. Circuit assumed that Brown could prevail against the RTC on his claim of wrongful exclusion from bidding.

The D.C. Circuit addressed Brown's declaratory and monetary claims separately. With regard to Brown's claim for declaratory relief, the D.C. Circuit held that Brown could not obtain redress because the Fourth Circuit's decision pertaining to Brown's claims for injunctive relief in that court were res judicata as to Brown's claims for declaratory relief. With regard to Brown's claim for monetary relief, the D.C. Circuit held that Brown could not obtain redress because his claim was too speculative. For the reasons that follow, Brown respectfully submits that the D.C. Circuit erred in both respects, and that Brown does have standing based either on the express right of action under 12 U.S.C. § 1821(d)(6)(A) or on the implied private right of action under the Cort analysis.

The D.C. Circuit was plainly wrong in ruling that the Fourth Circuit's holding with respect to Brown's claims for injunctive relief in that court were res judicata as to Brown's claims for declaratory relief.

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[7] According to the D.C. Circuit, redressability was one of three elements required to confer standing. Brown agrees, but his claims were clearly redressable for the reasons stated in this petition.

Brown's complaint in the U.S. District Court for the Eastern District of Virginia sought declaratory judgments regarding the unconstitutionality of the RTC's actions, its bidding procedures and its regulations, Brown's legal and Constitutional rights, and Brown's contractual rights and obligations. The district court dismissed each of these claims with prejudice. As stated above, however, the Fourth Circuit "modif[ied] [the district court's] disposition to reflect a dismissal without prejudice of Brown's claims against the RTC, so that Brown may indeed pursue his claims according to the statutory scheme." (Appendix 3) (emphasis supplied). The Fourth Circuit's modification of the district court's disposition to reflect a dismissal without prejudice plainly encompassed both Brown's monetary claims against the RTC as well as his claims for declaratory judgment against the RTC.

In strict accordance with the Fourth Circuit's Opinion, Brown exhausted the RTC's administrative procedures. After the RTC formally disallowed his claims, Brown filed his Complaint in the district court below. In Count I, Brown claimed that the RTC's sale of the notes to CMF was illegal, null and void, and asked the court to issue a declaratory judgment with regard to the parties' legal rights and obligations. However, despite Brown's adherence to the Fourth Circuit's instructions, the district court ruled that his claim for declaratory judgment was barred by the doctrine of res judicata based upon the Fourth Circuit's decision. (Appendix 4). The D.C. Circuit blindly followed the district court's lead.

"[R]es judicata prevents the relitigation of any claim that was or might have been brought in a prior action resolved on its merits...." Novak v. World Bank, 703 F.2d 1305, 1309 (D.C.Cir. 1983) (Emphasis supplied). The glaring

error in the D.C. Circuit's decision is that the Fourth Circuit did not resolve Brown's claims for declaratory judgment on their merits. To the contrary, the Fourth Circuit modified the dismissal of Brown's claims for declaratory judgment with prejudice to reflect a dismissal without prejudice. The dismissal of a claim without prejudice cannot serve as the basis for a res judicata defense. The Fourth Circuit's dismissal of Brown's declaratory judgment claims without prejudice is the law of the case. Res judicata simply is not applicable to Count I of Brown's Complaint.

The D.C. Circuit was also plainly wrong in ruling that Brown's claims for monetary relief were too speculative. Brown's damage claim, which the D.C. Circuit characterized as one for "lost profits," could have been proven through the use of a number of different methodologies.[8] First, Brown would have offered proof of the profits he would have realized had he been allowed to continue developing the Properties, through appraisals, comparable sales and/or outstanding offers. Alternatively, Brown would have offered proof of the difference between the fair market value of the Properties and the price he would have paid for the deferred purchase money note had he been permitted to bid. These methodologies present acceptable means of proving Brown's damages, none of which are too speculative even to confer standing.

Brown's claims for money damages may be more difficult to prove with reasonable certainty than other more typical claims for money damages. It may also be that, for

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[8] Courts have awarded lost profits under appropriate circumstances. See e.g., Flota Mercante Grancolombiana v. Federal Maritime Commission, 373 F.2d 674, 677 (D.C.Cir. 1967); Sears, Roebuck and Company v. Goudie, 290 A.2d 826, 833-34 (D.C.App. 1972).

this reason, the "better" remedy for the RTC's wrongs would have been to rescind the sale of the notes, resolicit bids, and allow Brown to bid. According to the Fourth Circuit and the D.C. Circuit, however, Congress saw fit to preclude the "better" remedy. Nevertheless, Brown should not be punished for Congress's decision. Brown should be given every chance to prove his damages claim.

The D.C. Circuit's decision is also inconsistent with the logic and public policy rationale of this Court's decision in U.S. v. Winstar Corp. et al. 116 S.Ct. 2432 (1996). The Government argued in Winstar that FIRREA endowed the Government with defenses of sovereign immunity and the unmistakeability principle. The Court held, however, that:

> [T]he contracts have not been construed as binding the Government's exercise of authority to modify banking regulation or of any other sovereign power, and there has been no demonstration that awarding damages for breach would be tantamount to any such limitation.

Id. at 2458. In other words, parties aggrieved by the conduct of the RTC should not be denied every avenue of relief, but instead should be afforded the opportunity to pursue a claim for money damages against the RTC. Indeed, this Court further stated, "damages are always the default remedy for breach of contract." 116 S.Ct. at 2460. The Court cited with approval comment a to § 346 of the Restatement (Second) of Contracts ("Every breach of contract gives the injured party a right to damages against the party in breach.")

In addition to what the D.C. Circuit characterized as a claim for lost profits, Brown also sought recovery of his bid preparation costs in accordance with the legal principles established in Keco Industries v. United States, 203 Ct. Cl. 566, 592 F.2d 1200 (1974) and in Heyer Products v. United States, 135 Ct. Cl. 63, 140 F.Supp. 409 (1956). These cases establish that the Government impliedly contracts with prospective contractors to fairly consider their proposals, the breach of which gives rise to a claim for damages. Winstar establishes that FIRREA does not insulate the RTC from breach claims. The D.C. Circuit's decision, however, denies that Brown even has standing to assert such claims.[9]

In a case strikingly similar to the case at bar, a U.S. District Court applied the Cort test and concluded that a person in Brown's position did in fact have a private right of action against the RTC under 12 U.S.C. §1441a(a)(14)(B). Crowe v. Smith, 852 F.Supp. 533 (W.D.La. 1994).

In Crowe, Crowe sought to purchase real property owned by the RTC, but the RTC rejected Crowe's offer purportedly because the offer did not meet the RTC's

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[9] Based on an apparent misconception regarding the damages sought in Brown's Complaint, the D.C. Circuit concluded that bid preparation costs were not even alleged. This conclusion is not correct. During oral argument, Brown's counsel explained that Brown "certainly had out of pocket expenses in attempting to prepare a package to submit for bid ... That's included in the damages alleged in the complaint" (Tr. 9). The court acknowledged that such damages were pled by Brown: "Perhaps you've got enough here, although I doubt it, to hold onto this bidding preparation expenses,..." (Tr. 13). In short, Brown's bid preparation costs and the government's breach of its implied contract to fairly consider Brown's bid were certainly at issue.

bidding conditions.[10] Crowe filed suit against, among others, the RTC, alleging that the RTC violated 12 U.S.C. §1441a(a)(14)(B). The RTC filed a motion to dismiss and argued that Crowe had no private right of action against the RTC. The Crowe court examined each prong of the Cort test and concluded that the RTC's position was without merit. With regard to the first prong, whether Crowe was among the class of persons for whose special benefit the statute was enacted, the court answered in the affirmative. The court stated that Congress enacted FIRREA in the interest of the taxpayers and, therefore, all tax-paying Americans satisfied this first prong. Moreover, as §1441a(a)(14)(B)(viii) specifically required the promulgation of "standards for adequate competition and fair and consistent treatment of offerors," the court held that FIRREA was enacted for the special benefit of Crowe, an offeror.[11]

The Crowe court described the second prong - whether there was any legislative intent to create a private remedy - as the most important inquiry. The court concluded that there was such an intent: "Because Congress in FIRREA mandated the establishment of procedures and standards to protect offerors, the statute itself indicates legislative intent

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[10] Plaintiff Crowe appears to have been in a similar position to that of Brown. Crowe was a member of a partnership that purchased and sought to develop real property as residential housing, but was prevented from doing so by the failed institution to whose interests the RTC later succeeded. Crow was "financially exhausted," and foreclosure proceedings were instituted. Crowe sought to "repurchase the property" with new investors, but the RTC denied Crowe the right to bid on the properties. 852 F. Supp. at 536.

[11] The Crowe court did not even consider the RTC's obligations under 12 U.S.C. § 1821(d)(13)(E)(iii).

to create a remedy for breaches of these standards and procedures." 852 F.Supp. at 540. In reaching this conclusion, the Crowe court relied upon the D.C. Circuit's decision in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970). In Scanwell, the D.C. Circuit concluded that disappointed bidders for federal contracts had standing in federal court to sue the federal government. The Crowe court quoted the following passage from Scanwell:

> [w]hen Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests....

Crowe, 852 F.Supp. at 539, quoting, Scanwell, 424 F.2d at 864.[12]

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[12] The D.C. Circuit in Scanwell further stated:

> Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits....

424 F.2d at 866-67.

The Crowe court quickly dispensed with the third and fourth prongs of the Cort test. With regard to the third prong - whether it was consistent with the underlying purposes of the legislative scheme to imply a private right of action - the court concluded that it was "entirely consistent with the purposes of FIRREA ... to grant a private right of action 'whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests....'" 852 F.Supp. at 540, quoting, Scanwell, 424 F.2d at 864. The fourth prong - whether the cause of action was one traditionally relegated to state law - "was indisputably answered in the plaintiffs' favor." 852 F.Supp. at 540. Whether a federal agency disposes of federal property properly is an issue solely of federal concern. Id.

The reasoning applied by the district court in Crowe is equally applicable to the case at bar. As did Crowe, Brown challenges the RTC's "standards for adequate competition and fair and consistent treatment of offerors." See 12 U.S.C. §1441a(a)(14)(B). Brown also challenges the RTC's breach of its duty to "ensure[] adequate competition and fair and consistent treatment of offerors." See 12 U.S.C. §1821(d)(13)(E). Moreover, Brown challenges the RTC's power to exclude him as an offeror. See 12 U.S.C. §1441a(f). Brown satisfies all four prongs of the Cort test and therefore has a private right of action against the RTC for its violations of FIRREA.

III. The Decision Of The Court Of Appeals For The District Of Columbia That Brown Lacks Standing Constitutes A Violation Of Brown's Due Process Rights

The fundamental constitutional question presented by this petition for writ is whether a private citizen aggrieved by the wrongful conduct of a government agency should be left entirely without a remedy. After the RTC wrongfully excluded him from bidding, Brown theoretically had at least two different remedies. Brown could have sought injunctive relief, i.e., rescission of the sale of the notes and a rebid which included Brown. Brown also could have sought money damages. Brown sought both. Brown's claims for injunctive relief were rejected by the Fourth Circuit on the basis of 12 U.S.C. § 1821(j). (Appendix 3). However, the Fourth Circuit expressly recognized Brown's right to pursue his money damages against the RTC.

Although Brown disagreed with the Fourth Circuit's disposition of his claims for injunctive relief, he at least was not left without a remedy. However, before the D.C. Circuit, Brown's right to pursue his only remaining remedies - declaratory judgment and money damages - was eliminated. The D.C. Circuit did not reach the merits of Brown's claims; instead, it simply held that Brown had no standing to sue the RTC for what the court assumed was wrongful conduct.

The D.C. Circuit's disposition of Brown's claims is not only incorrect and unfair, but directly contradicts at least two of its own prior decisions. See Freeman v. F.D.I.C., 56 F.3d 1394 (D.C.Cir. 1995); National Trust For Historic Preservation v. F.D.I.C., 21 F.3d 469 (D.C.Cir. 1994). In both cases, the D.C. Circuit wrestled with the draconian

nature of the FIRREA's anti-injunction provision, 12 U.S.C. §1821(j). The D.C. Circuit applied §1821(j) as a bar in both cases, but was very careful to emphasize that the elimination of injunctive relief as a remedy did not leave the plaintiff entirely without a remedy. In National Trust, Judge Wald opined in her concurring opinion:

> Therefore, I am compelled to conclude that §1821(j) does indeed bar courts from "restrain[ing] or affect[ing] the exercise of powers or functions of the [FDIC] as conservator or a receiver...." I am somewhat assuaged by the fact, described at oral argument and in the briefs, that a private person genuinely aggrieved by such unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the §1821(d) monetary claims procedure which ultimately includes judicial review.

National Trust, 21 F.3d at 472. Relying on Judge Wald's concurring opinion in National Trust, the D.C. Circuit went one step further in Freeman. After enforcing the bar of §1821(j), the court ruled:

> [A]s we noted in National Trust, serious due process concerns would be implicated if parties aggrieved by FDIC's actions as receiver were left entirely without remedies. In many cases, however, aggrieved parties will have opportunities to seek money damages or other relief through the administrative claims process provided in 12 U.S.C. §1821(d), and their claims are

> ultimately subject to judicial review. (Emphasis supplied).

Freeman, 56 F.3d at 1399.

The above passage from Freeman hits the nail squarely on the head. The D.C. Circuit first held that Brown could not obtain any form of equitable relief, be it injunctive or declaratory. Next, in direct contravention of the Fourth Circuit and its own decisions in National Trust and Freeman, the D.C. Circuit ruled that Brown had no standing to pursue his claims for money damages against the RTC. The RTC is thus completely immune from liability for its wrongful conduct, while Brown is left entirely without any remedies. If this result does not implicate due process concerns, then nothing does.[13]

Moreover, not only is the D.C. Circuit's decision in this case inconsistent with its own previous rulings, but it is also inconsistent with previous rulings of this Court and other Circuits. In South Carolina v. Regan, 104 S.Ct. 1107 (1984), this Court held that the Anti-Injunction Act relating to tax matters did not apply to this particular plaintiff because there was no alternative remedy. The Court concluded: "[T]he Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress

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[13] The D.C. Circuit in both National Trust and Freeman recognized that, under appropriate circumstances, the denial of injunctive relief could itself constitute a violation of due process, if such denial also denied the aggrieved party of every other avenue of relief. Freeman, 56 F.3d at 1403; National Trust, 21 F.3d at 473. In the present case, assuming arguendo that the D.C. Circuit is correct and Brown has no standing to pursue his money damages, then the denial of declaratory relief may itself constitute a violation of due process as well.

did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 104 S.Ct. At 1114. See also, U.S. v. Winstar, supra.

In the instant case, the Fourth Circuit denied Brown's claims for injunctive relief based on FIRREA's anti-injunction provision (§ 1821(j)), and instructed Brown to pursue his alternative remedies provided by Congress under § 1821(d)(6)(A). However, the D.C. Circuit held that Brown had no standing to pursue these alternative remedies. This Court's decision in Regan teaches that both the Fourth Circuit and the D.C. Circuit cannot be correct, and that Congress certainly had no intention of enacting such a patently unfair legislative scheme that would leave an aggrieved party without any remedy. Inasmuch as it is too late to reconsider the wisdom of the Fourth Circuit's ruling, Brown respectfully submits that the D.C. Circuit's decision be reversed and Brown given the opportunity to pursue his alternative remedies.

Other Circuits, while specifically addressing FIRREA, have reached similar conclusions. In Bueford v. R.T.C., 991 F.2d 481 (8th Cir. 1993), a claimant argued that the RTC's administrative procedures amounted to a deprivation of her due process rights. The court disagreed, however, because her claims were subject to de novo judicial review: "Since the language of the statute [12 U.S.C. § 1821(d)(6)(A)] provides for judicial review after exhaustion of the administrative procedures, Bueford cannot prevail on her claim that FIRREA's administrative procedures deny her due process by making judicial review unavailable." 991 F.2d at 486. See also, Telematics International, Inc. v. NEMLC Leasing Corp., 967 F.2d 703, 705 (1st Cir. 1992) ("Congress did not leave individuals having claims against

the institution without a remedy, however....A party may seek administrative review or may pursue legal remedies in the district court.")

The D.C. Circuit cannot be correct in its decision to strip Brown of his sole remaining remedy against the RTC. Otherwise, Brown would have no remedy and will have thus been deprived of his due process rights. Congress clearly never intended this result.

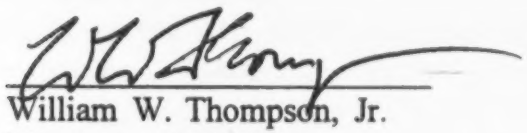
IV. Summary

The ramifications of the D.C. Circuit's decision are far greater than simply the inequitable and unconstitutional result occasioned in this case. There is no reason that the D.C. Circuit's rationale could not be applied to any aggrieved citizen or to any federal agency. According to the D.C. Circuit, regardless of the damage inflicted by a federal agency, the aggrieved citizen does not even have standing to challenge the wrongs committed. This is a dangerous new direction which is not supported by any of this Court's precedents. If Brown has no standing, then federal agencies will be free to violate bidding rules with impunity.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Of Counsel:

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sidney J. Brown, et al.,

Appellants

v.

Resolution Trust Corporation, No. 96-5075

Appellee

On Appeal from the United States District Court
for the District of Columbia

Before: **SILBERMAN** and **HENDERSON**, *Circuit Judges,* and **BUCKLEY**, *Senior Circuit Judge.*

JUDGMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(b). For the reasons set out in the accompanying memorandum, it is

ORDERED that the judgment of the district court be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

Mark J. Langer, Clerk

Sidney J. Brown, et al v. Resolution Trust Corporation, No. 96-5075

MEMORANDUM

The appellants, general partners in Nattchase Associates Limited Partnership (Nattchase), appeal the district court's dismissal of their complaint against the Resolution Trust Corporation (RTC). In June 1988, Nattchase financed the purchase of two parcels of real property in Loudon County, Virginia with a $36 million loan from the San Jacinto Savings Association (San Jacinto), secured by a nonrecourse promissory note and a deed of trust on the properties. Nattchase defaulted on the loan in 1989. RTC was appointed receiver for San Jacinto in December 1990 under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). In March 1993, RTC put the note up for sale at auction, "packaged" with other non-performing loans. RTC subsequently sold the package to CMF Loudon, L.P. (CMF), the winning bidder. When CMF attempted to foreclose on the deed of trust the appellants filed an action in the Eastern District of Virginia against RTC, San Jacinto and its affiliates and CMF and its principals. The complaint alleged, *inter alia*, that RTC had wrongfully deprived the partnership of the opportunity to bid on its note and sought declaratory relief, rescission of the sale and damages therefor.

The district court dismissed all of the plaintiff's claims with prejudice. On appeal the Fourth Circuit modified the district court's ruling to reflect dismissal *without prejudice* of most of the claims against the RTC, pending exhaustion of administrative remedies under 12 U.S.C. § 1821(d)(6)(A) and

injunctive relief, rescission of the contract of sale between RTC and CMF for the note," concluding such relief was "barred by 12 U.S.C.A. § 1821(j)."[1] *Brown v. RTC*, No. 93-2597, slip op. at 8-9 (4th Cir. July 25, 1994).

After unsuccessfully pursuing its administrative remedies, Nattchase filed this action, alleging that in excluding Nattchase from the bidding RTC (1) exceeded its statutory authority under 12 U.S.C. § 1441a(f)(1)(A),[2] (2) took the partnership's real property without compensation in violation of the fifth amend-

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[1] Section 1821(j) provides: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver."

[2] This subsection provides:

> (A) The Corporation shall prescribe regulations to prohibit the sale of assets of a failed institution by the Corporation to any person who--
>
> (A)(i) has defaulted, or was a member of a partnership or an officer or director of a corporation which has defaulted, on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution;
>
> (ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and
>
> (iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation or from any institution subject to the jurisdiction of the Corporation pursuant to paragraph (3)(A);

12 U.S.C. § 1441a(f)(1)(A).

ment[3] and (3) acted "wrongfully, unreasonably, arbitrarily, capriciously, erroneously and in bad faith." Joint Appendix (JA) 10. The district court below dismissed all three counts on various grounds. We affirm the dismissal because the appellants lack standing under Article III of the United States Constitution to pursue this action.

"'[T]he irreducible constitutional minimum of standing contains three elements,' commonly referred to as (1) injury-in-fact, (2) causation (or traceability), and (3) redressability." *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Assuming without deciding that the appellants could otherwise prevail on a claim of wrongful exclusion from bidding,[4] we conclude that they lack standing because they cannot obtain redress in this action for any injury caused by RTC's actions.

First, the appellants are foreclosed from securing the equitable relief they seek under the doctrine of *res judicata*. Their complaint below sought a "declaratory" judgment that "the sale of the notes to CMF was illegal, null and void." This is the same claim for relief that the Fourth Circuit held was unavailable to them in the suit filed in the Eastern District of Virginia. *See Brown v. RTC*, No. 93-2597, slip op. at 8-9 (4th Cir.

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[3] The appellants have apparently abandoned their fifth amendment argument on appeal.

[4] It is likely, as the district court concluded, the appellants lack a private right action under FIRREA against RTC. *See Cort v. Ash*, 422 U.S. 66 (1975).

July 25, 1994) (quoted *supra*, upholding dismissal with prejudice of claim for recision).[5] Because the claim was "actually litigated and determined" in that suit the Fourth Circuit's affirmance of dismissal is *res judicata* and conclusive in this action. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 864 (1984). Accordingly, it does nothing to confer standing on the partners.

The partners' claim for money damages is likewise unavailing. Their complaint alleges RTC caused Nattchase "a loss of investment costs and opportunities of over $30,000." JA 8. To the extent the damages reflect the partnership's initital investment, they are attributable to that investment and the subsequent default--they were not caused by the allegedly wrongful exclusion from bidding[6] and therefore cannot confer standing to sue RTC. *See Humane Society of the United States v. Babbitt,* 46 F.3d 93, 100 (D.C. Circuit 1995) (finding no standing if "challeneged action cannot . . . be said to have 'caused' the injury complained of," which would have occurred in absence of action, foreclosing "possibility that the injury suffered . . . could be redressed by a favorable decision"). Alternatively, insofar as the complaint seeks to recover profits the partnership

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[5] The claim as set out in the complaint there sought a "[j]udgment declaring the bid process utilized and applied by the Resolution Trust Corporation, pursuant to which [defendant purchasers] purportedly acquired an interest in the financial assets offered for sale by the Resolution Trust Corporation to be void, unenforceable, and rescinded." Complaint at 25 (*Brown v. RTC,* C.A. No. 93-1450-A (E.D. Va.)) (filed Nov. 19, 1993).

[6] At oral argument the partners' counsel suggested that the partnership incurred "out of pocket expenses in attempting to prepare a package to submit for bids" but no such injury was alleged in the complaint or even mentioned in the briefs.

might have realized had it successfully bid on, purchased and developed the property, the injury alleged is simply too speculative. *See United Transp. Union v. ICC*, 801 F.2d 908, 912 (D.C. Cir. 1989) ("[I]f courts were obligated to credit complainants' predictions of future events or injuries, both the "redressability" prong and, in cases alleging prospective injury, the "fairly traceable" prong of the standing inquiry--which are, at bottom, predictions of cause and effect--would be reduced to mere pleading requirements.").

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Sidney J. Brown, et al.,

Appellants

v.

Resolution Trust Corporation, No.96-5075

Appellee

BEFORE: Silberman and Henderson, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed February 14, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk

APPENDIX 3

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederick K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation, No. 93-2597

Plaintiffs - Appellants,

v.

Resolution Trust Corporation; San Jacinto Savings Association, F.A.; Sajacito, Inc.; Southmark Corporation; CMF Loudoun, L.P., c/o Carl M. Freeman Associates, Inc.; Carl M. Freeman; Robert E. Sevila, Trustee,

Defendants - Appellees.

Sidney J. Brown; Saul H. Bernstein;
Sidney J. Brown and Saul H. Bernstein,
as the General Partners of Nattchase
Associates Limited Partnership on behalf
of the Limited Partners Stuart G. Brown,
Frederick K. Wine, Bradley S. Bernstein
and MDB Investments Limited Partnership;
Nattchase Associates Limited Partnership;
Mid City Redevelopment Corporation,

No. 94-1104

Plaintiffs - Appellants,

v.

Resolution Trust Corporation;
San Jacinto Savings Association,
F.A.; Sajacito, Inc.; Southmark
Corporation; CMF Loudoun, L.P.,
c/o Carl M. Freeman Associates, Inc.;
Carl M. Freeman; Robert E. Sevila,
Trustee,

Defendants - Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Loenie M. Brinkema, District Judge.
(CA-93-1450-A)
Argued: June 10, 1994
Decided: July 25, 1994
Before MURNAGHAN, WILKINS and WILLIAMS,
Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

ARGUED: William W. Thompson, Jr., THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. P. Matthew Sutko, RESOLUTION TRUST CORPORATION, Washington, D.C.; Philip John Harvey, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia, for Appellees. ON BRIEF: Michael A. Branca, THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. Munsell St. Clair, RESOLUTION TRUST CORPORATION, Washington, D.C.; Theresa V. Gorski, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia; Beverlee R. Peters, Lisa Erich, S. Beryl Adler, ADLER, ROSEN & PETERS, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P.36.5 and 36.6.

OPINION

PER CURIAM:

In these consolidated appeals, Sidney J. Brown [1] challenges two orders by the district court, the first denying injunctive relief and dismissing the instant action with prejudice, and the second denying a subsequent motion to vacate or modify the dismissal order. Brown argues that his claims against Resolution Trust Corporation (RTC) should not have been dismissed, despite his failure to pursue the applicable administrative remedies as required by 12 U.S.C.A. §1821(d)(6)(A), (13)(D)(ii) (West 1989), because RTC's exclusion of Brown from the bidding process was an act which exceeded RTC's statutory authority. Brown next argues that the district court erred in concluding that he had failed to state a cognizable cause of action against either RTC or CMF Loudoun, L.P., and its principal, Carl M. Freeman (CMF). Brown's last contention challenges the denial of injunctive relief as to RTC's transfer of the promissory note in question to CMF and CMF's subsequent foreclosure thereon.

We find that Brown's failure to pursue his claims against RTC under the applicable administrative procedures bars federal jurisdiction to review those claims. We therefore

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[1] This action was initiated, and this appeal is pursued, by several individuals and business entities, including Brown, Saul H. Bernstein, Nattchase Associates Limited Partnership (Nattchase), Brown and Bernstein as general partners of Nattchase on behalf of its limited partners, and Mid City Redevelopment Corporation. We refer to Appellants jointly as Brown.

affirm the dismissal of all claims against RTC, amending that disposition to reflect a dismissal without prejudice to allow pursuit of the available administrative relief. Finding no error as to the dismissal of Brown's claim against CMF, we affirm the dismissal with prejudice. Finally, we affirm the district court's denial of injunctive relief.

I.

In June 1988, Nattchase obtained a $36 million loan from the San Jacinto Savings Association. The loan was secured with a non-recourse promissory note and deed of trust on real property located in Loudoun County, Virginia. The loan went into default in 1989. RTC was appointed receiver for San Jacinto Savings Association in December 1990. In July 1993, RTC sold the note to CMF, as part of a package of non-performing loans from failed thrifts, after an auction and bidding process between March and May 1993. CMF subsequently sought to foreclose on the deed of trust securing the note. Brown initiated this action in an attempt to halt that foreclosure.

Brown's primary complaint is that RTC improperly excluded him from bidding on the note securing the Loudoun County property, and thereby deprived him of the opportunity to recoup his investment in that property. Brown also contends that CMF was unjustly enriched through Brown's efforts. The complaint--seeking, *inter alia,* a declaratory judgment finding RTC's bidding procedures unconstitutional, rescission of the contract of sale between RTC and CMF, a judgment requiring another bidding process for the note, injunctive relief against

CMF's scheduled foreclosure, and related damages--was dismissed with prejudice.

In considering Brown's various challenges to the dismissal of his complaint, we turn first to his claims against RTC.

II.

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) provides that, "[e]xcept as otherwise provided in this subsection, no court shall have jurisdiction over . . .(ii) any claim relating to any act or omission of such institution or the Corporation as receiver." 12 U.S.C.A. §1821(d)(13)(D); *see also* 12 U.S.C.A. §1821(d)(6)(A) (de novo judicial review permitted only after exhaustion of available administrative procedures). This court, like most other circuit courts,[2] has determined that claimants must submit their claims against RTC to the administrative claims process established by FIRREA before seeking judicial review. *Brady Dev. Co. v. RTC,* 14 F.3d 998, 1003 (4th Cir. 1994) ("Congress sought to ensure that *all* claims undergo the administrative

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[2] *See, e.g., Heno v. FDIC,* 20 F.3d 1204, 1206-07 (1st Cir. 1994); *Bueford v. RTC,* 991 F.2d 481, 484 (8th Cir. 1993); *Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.), *cert. denied,* 114 S.Ct. 559 (1993); *Office & Professional Employees Int'l Union, Local 2 v. FDIC,* 962 F.2d 63, 66 (D.C.Cir. 1992); *Meliezer v. RTC,* 952 F.2d 879, 882 (5th Cir. 1992); *RTC v. Elman,* 949 F.2d 624, 627 (2d Cir. 1991); *RTC v. Mustang Partners,* 946 F.2d 103, 106 (10th Cir. 1991); *FDIC v. Shain, Schaffer & Rafanello,* 944 F.2d 129, 136 (3d Cir. 1991); *see also Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.,* 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.").

claims process and are under the exclusive control of the RTC.") (emphasis added). This exhaustion requirement applies to claims arising both before and after RTC's appointment as receiver, *Rosa v. RTC,* 938 F.2d 383, 392-93 (3d Cir.), *cert. denied,* 112 S.Ct. 582 (1991), and to declaratory judgment actions. *See Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.) (§1821(d)(13)(D) "bars judicial review of any non-exhausted claim, *exhausted or nonmonetary,* which is 'susceptible of resolution through the claims procedure'")(quoting *Rosa,* 938 F.2d at 394) (emphasis added), *cert. denied,* 114 S.Ct. 559 (1993); *Feise v. RTC,* 815 F.Supp. 344, 347 (E.D.Cal. 1993) (declaratory judgment claims barred by §1821(d)(13)(D)).

Brown erroneously argues that, because RTC acted outside its statutory authority in excluding him from the bidding process, FIRREA's administrative process is inapplicable to his claims. To the contrary, RTC's transfer of the assets of the failed San Jacinto Savings Association to CMF was clearly an act within its statutory authority. 12 U.S.C.A. §1821(d)(2)(B), (E), (G)(i)(II) (West 1989 & Supp. 1994). RTC's exclusion of Brown from the bidding process constitutes, at best, an erroneous determination by RTC as to permissible bidding participants. "[E]ven if the RTC improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Ward v. RTC,* 996 F.2d 99, 103 (5th Cir. 1993). Hence, Brown must first pursue his claims under FIRREA's administrative scheme.

Brown also argues that resort to the administrative scheme would be futile, as purportedly evidenced by RTC let-

ters responding to Brown's inquiries after transfer of the note to CMF.[3] This argument is similarly without merit, because judicially-created futility exceptions cannot supplant statutorily-promulgated exhaustion requirements. *Weinberger v. Salfi,* 422 U.S. 749, 766 (1975); *FDIC v. Shain, Schaffer & Rafanello,* 944 F.2d 129, 136 (3d Cir. 1991). Moreover, the letters relied upon by Brown are "not necessarily conclusive of the receiver's determination of [Brown's] claims" since "[i]f RTC as receiver were to allow and satisfy [Brown's] claims in whole or in part, the dispute now before this court would be moot to that extent." *Rosa,* 938 F.2d at 395. There is no plausible basis for the futility exception absent "'a hard and fast

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[3] The first letter to RTC, dated September 8, 1993, and characterized by Brown as a flat refusal to consider Brown's claims, read in pertinent part:

> While I understand you may be disheartened by the demands of the new owner and holder of your loan, I fail to see any action which can or will be taken, or on behalf of the RTC in this regard. Please allow this to confirm that the RTC cannot, and will not honor your request to set aside the sale and re-advertise the package, allowing NALP [i.e., Nattchase] to bid. Any further issues which you wish to raise relative to the Loan should be raised with the new owner and holder of the same, as the RTC (as conservator, receiver or otherwise) no longer maintains any right, title or interest in the Loan.

(J.A. at 83-84.) Brown contends that the second letter from RTC, actually a series of letters to him, Bernstein, Nattchase, and Mid City, dated November 29, 1993, with enclosed proof-of-claim forms, contemplates only monetary claims against failed institutions and not claims against RTC itself. However, the letters actually concern any claims "for payment from, or . . . determination[s] of rights with respect to the assets of a failed institution, or . . . claim[s] relating to any act or omission of a failed institution . . . ." (J.A. at 86, 87, 88, 89.)

position [by RTC] that [makes] an adverse ruling a certainty,'" because "[t]o excuse exhaustion based on an 'unsupported allegation of futility would allow the futility exception to swallow the exhaustion rule.'" *Darby v. Kemp,* 957 F.2d 145, 148 (4th Cir. 1992) (quoting *Thetford Properties IV Ltd. v. United States Dep't of Housing & Urban Dev.,* 907 F.2d 445, 450 (4th Cir. 1990)), *reversed on other grounds,* 113 S.Ct. 2539 (1993). Contrary to Brown's argument, resort to the FIRREA administrative scheme is not futile.

For these reasons, we find that the district court properly dismissed Brown's claims against RTC, pending presentation of his claims to RTC under the statutory administrative procedures. However, consistent with RTC's concession, we modify that disposition to reflect a dismissal without prejudice of Brown's claims against RTC, so that Brown may indeed pursue his claims according to that statutory scheme.[4] *See* 28 U.S.C. §2106 (1988).

III.

Our determination that Brown must first utilize FIRREA's administrative scheme with regard to his claims against RTC does not preclude *de novo* review of the district court's Fed.R.Civ.P. 12(b)(6) dismissal with prejudice of Brown's unjust enrichment claim against CMF. *See Estate Constr. Co. v. Miller & Smith Holding Co.,* 14 F.3d 213, 217 (4th Cir.1994) (standard of review).

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[4] Given this disposition, we dismiss as moot RTC's motion to dismiss the appeal for failure to exhaust the statutory administrative procedures.

Under Virginia law, the applicable state law in this case, unjust enrichment requires proof that the plaintiff conferred a benefit on the defendant, which was requested and accepted by the defendant under circumstances that reasonably notified him that the plaintiff expected compensation from the defendant. *Raymond, Colesar, Glaspy & Huss v. Allied Capital Corp.*, 961 F.2d 489, 491 (4th Cir. 1992); *Kern v. Freed, Co.*, 299 S.E.2d 363, 365 (Va. 1983). Brown has not alleged, and there is no support in the record, that he conferred any benefit on CMF, or that CMF requested or received any benefit from Brown. CMF merely purchased a promissory note from RTC on which Nattchase is liable. Because no relief can be granted to Brown under any set of facts that could be proven consistent with the allegations in this complaint, the district court properly dismissed that cause of action with prejudice, and we affirm that disposition. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989).

IV.

We also find that the district court did not abuse its discretion in denying Brown's requested injunctive relief. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991) (standard of review).

Brown's first requested injunctive relief, rescission of the contract of sale between RTC and CMF for the note, is expressly barred by 12 U.S.C.A. §1821(j) (West 1989): "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions

of the Corporation as a conservator or a receiver." *See In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) ("The comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC full rein to exercise its statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other proceedings."). We joint the First, Second, Fifth, Sixth, and District of Columbia Circuits in holding that §1821(j) forbids equitable rescission, as sought by Brown in this case.[5] The district court, therefore, properly denied Brown's motion for injunctive relief against RTC.

Brown also sought a temporary restraining order against CMF, enjoining its imminent foreclosure on the note purchased from RTC. As demonstrated by our discussion in Part III, there is no cognizable unfair enrichment cause of action in this case, thereby precluding any basis for injunctive relief against the scheduled foreclosure. Hence, the district court also properly denied the requested temporary restraining order against CMF.

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[5] *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir. 1994), *reinstating* 995 F.2d 238, 239 (D.C. Cir. 1993); *Heno*, 20 F.3d at 1208 n.8; *Ward*, 996 F.2d at 104; *United Liberty Life Insurance Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1993); *Harkness Apt. Owners Corp. v. FDIC*, No. 87 Civ. 7080, 1993 U.S. Dist. LEXIS 5452, at *8-9 (S.D.N.Y. Apr. 26, 1993), *aff'd without op.*, 999 F.2d 538 (2d Cir. 1993).

V.

Finally, the district court did not abuse its discretion in its subsequent denial of Brown's Fed.R.Civ.P. 60(b) motion, seeking vacatur of the district court's order denying injunctive relief and dismissing his complaint. *United States v. Williams,* 674 F.2d 310, 312 (4th Cir. 1982) (standard of review). According to Brown's motion, vacatur was necessary due to various alleged mistakes of law in the dismissal order. Our review of that motion reveals that it is "nothing more than a request that the district court change its mind," which "is not authorized by Rule 60(b)." *Williams,* 674 F.2d at 313; *see also Smith v. Evans,* 853 F.2d 155, 158 (3d Cir. 1988) (legal error, without more, cannot justify granting a Rule 60(b) motion). Moreover, as we have concluded, the order was not erroneous. Hence, Brown's Rule 60(b) motion was properly denied.

VI.

For the reasons stated herein, we affirm the district court's dismissal with prejudice of Brown's claim against CMF, and its denial of injunctive relief. We modify the dismissal of Brown's claims against RTC to reflect a dismissal without prejudice, and affirm that disposition. Finally, we affirm the district court's denial of Brown's Rule 60(b) motion.

AFFIRMED AS MODIFIED

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sidney J. Brown, et al.,

Plaintiffs,

Civil Action No. 95-00334(NHJ)

v.

Federal Deposit Insurance
Corporation,

Defendant.

ORDER

Presently before the Court are the motions of defendant to dismiss the complaint and for removal of *lis pendens*. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth in a Memorandum Opinion issued on this date, the Court will grant the motion to dismiss and deny the motion for removal of *lis pendens*. Accordingly, it is this 14th day of February, 1996,

ORDERED that defendant's motion to dismiss the complaint be, and hereby is, granted; it is further

ORDERED that defendant's motion for removal of *lis pendens* be, and hereby is, denied; and it is further

ORDERED that this case be, and hereby is, closed.

NORMAL HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Before the Court are the motions of defendant to dismiss the complaint and direct removal of *lis pendens*. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth below, the Court will grant the motion to dismiss and deny the motion to direct removal of *lis pendens*.

BACKGROUND

Plaintiffs Sidney Brown and Saul Bernstein, general and limited partners of Nattchase Associates Limited Partnership ("Nattchase"), bring this suit as individuals and as general partners on behalf of the limited partnership (collectively, "Brown").[1] In June 1988, Nattchase borrowed $36,000,000 from San Jacinto Savings Association, securing the loan with

---

[1] The complaint fails to describe the interest of plaintiff Mid-City Development Corporation in these proceedings. As the Court dismisses the complaint as to all plaintiffs, the Court need not address the failure of plaintiff Mid-City Development Corporation to plead a cause of action.

a non-recourse purchase money note (the "Nattchase Note") and a deed of trust on certain real property located in Loudoun County, Virginia. In December 1990, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), the Office of Thrift Supervision appointed the Resolution Trust Corporation (the "RTC") as receiver for San Jacinto Savings Association.

Nattchase defaulted on its loan sometime in 1989. In March 1993, the RTC included the Nattchase Note in a "pool" of non-performing loans put out for bid. Included in terms of the bid package was a statement that the RTC would not accept bids from defaulted borrowers who had not settled their defaulted obligations. Brown claims that Nattchase did not make a bid on the Nattchase Note because of this prohibition against bids from defaulted borrowers.

The RTC sold the pooled notes to CMF Loudoun L.P. ("CMF") for $14,000,000 of which $5,000,000 was allocable to the Nattchase Note. Brown claims that during settlement negotiations with the RTC before the sale of the pooled notes, Nattchase offered to purchase the Nattchase Note for more than the amount ultimately realized in the sale to CMF. After its purchase of the pooled notes, CMF moved to foreclose on the Loudoun County, Virginia, property securing the Nattchase Note.

In November 1993, Brown bought an action in the U.S. District Court for the Eastern District of Virginia against the RTC, San Jacinto Savings Association, Sajacito, Inc., Southmark Corporation, CMF, and Carl Freeman. *See* Brown v. Resolu-

tion Trust Corp., 1994 U.S. App. Lexis 18730 (4th Cir. 1994), *cert denied*, 115 S.Ct. 1994 (1995). Brown alleged that "the RTC improperly excluded him from bidding on a note securing the Loudoun County property, and thereby deprived him of the opportunity to recoup his investment in that property." *Id.* at 4. Brown also contended that CMF was unjustly enriched through Brown's efforts. *Id.* The complaint sought a declaratory judgment finding the RTC's bidding procedures unconstitutional, rescission of the contract of sale between the RTC and CMF, a judgment requiring another bidding process for the note, and injunctive relief against CMF's scheduled foreclosure. *Id.* The district court dismissed Brown's claims with prejudice.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's denial of injunctive relief to rescind the contract. While the Appellate Court affirmed the district court's dismissal with prejudice of the claims against CMF, the Court found that the district court should have dismissed without prejudice the claims against the RTC so that Brown might re-file the claims after exhausting his administrative remedies.

The RTC denied Brown's proof of claim on February 21, 1995, and Brown filed this action. In Count One of the complaint, Brown seeks a declaratory judgment that the RTC's sale of the Nattchase Note to CMF was illegal, null and void. In Count Two, Brown claims that the RTC took his property without compensation in violation of the Fifth Amendment. In Count Three, Brown claims that the RTC acted "wrongfully, unreasonably, arbitrarily, capriciously, erroneously, and in bad

faith" when it excluded him from the bidding process and denied his proof of claim.

DISCUSSION

I.

In ruling on the motion to dismiss, the Court must treat the allegations in the complaint as true. Berkovitz v. United States, 486 U.S. 531, 540 (1988). Even accepting Brown's allegations as true, it appears that his claims must fail as a matter of law. Brown argues in Count One that the sale of the Nattchase note by the RTC to CMF was illegal, null, and void. As Brown litigated -- and lost -- this issue when he sought recision of the sales agreement in the Fourth Circuit, the doctrine of *res judicata* bars Brown's request for judgment declaring the contract void. *See* Brown v. Resolution Trust Corp., 1994 U.S. App. Lexis 18730 at *7 (finding that the RTC's transfer of assets to CMF was clearly within its statutory authority). The Court will dismiss this Count.

Brown argues next that the RTC deprived him of the Nattchase Note and his interest in the Loudoun County, Virginia, property, without just compensation. Brown's claim is utterly without merit. First, it is clear that the RTC did not deprive Brown of the Nattchase Note. Brown was the *obligor* on the Note. San Jacinto Savings Association owned the note. The RTC, as receiver for San Jacinto Savings Association, sold the thrift's property to CMF. Second, the RTC did not deprive Brown of his interest in the Loudoun County, Virginia property. Brown lost his interest in that property when CMF foreclosed on the Nattchase Note. The RTC was not a party to the foreclosure action. As Brown's damages, if any, flow directly from his own action -- his 1989 default on the Nattchase

Note -- the Court will dismiss Count Two for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12 (b)(6).

Brown's final claim is the central issue in this dispute. Brown claims in Count Three of the complaint that:

> [b]y excluding Plaintiff's from bidding on the notes securing the properties and by denying Plaintiff's Proof of Claim, Defendant RTC acted wrongfully, unreasonably, arbitrarily, capriciously, erroneously and in bad faith, and Defendant is liable to Plaintiffs for all damages resulting therefrom.

Turning first to Brown's complaint that the RTC wrongfully denied his proof of claim, there is no judicial review of a decision by the RTC not to allow a claim. 12 U.S.C. § 1821 (d)(5)(E). Thus Brown, has failed to state a valid claim with respect to this issue. Next, turning to Brown's complaint that the RTC wrongfully excluded him from bidding on the Nattchase Note, there are no provisions in the Act or the agency's regulations that require the RTC to allow an interested party to bid on thrift properties. Although Congress has specified that certain persons may *not* bid on properties held by the RTC as receiver, 12 U.S.C. § 1441a(a)(f)(1),[2] it has entrusted the section of all other offerors to agency discretion.

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[2] Under 12 U.S.C. § 1441a(a)(f)(1), the RTC is required to develop regulations to prohibit the sale of thrift assets to certain categories of persons who have caused substantial losses to the failed institution.

See 12 U.S.C. § 1821(d)(2)(G)(i)(II) (granting the RTC full discretion in disposing of thrift assets).

Even assuming *arguendo* that Brown's exclusion from bidding on the notes violated the Act, Brown lacks standing to seek judicial relief. FIRREA contains an elaborate series of administrative procedures to settle claims brought by a failed thrift's creditors. *See* 12 U.S.C. § 1821(d)(5)-(8). After exhaustion of the administrative procedures, a claimant may bring the claim *de novo* in court or seek further agency review. *See* 12 U.S.C. § § 1821(d)(5)(E), 1821 (d)(6)(A). These procedures are the Act's only express private causes of action against the RTC. As even Brown does not contend that an action for enforcement of an alleged "right to bid" falls under the provision for adjudication of creditors' claims, Brown urges the Court to find an "implied private cause of action" under 12 U.S.C. § 1441a(a)(14)(B)(viii).

It is well-settled that a court may imply a prive right of action only when there is clear evidence that Congress so intended. Cort v. Ash, 422 U.S. 66, 78 (1975). There is no such evidence here. Under 12 U.S.C. § 1441a(a)(14)(B)(viii), Congress instructed the Thrift Depositor Oversight Protection Board to establish minimum policies and procedures, including "[s]tandards for adequate competition and fair and consistent treatement of offerors." The congressonal intent in 12 U.S.C. § 1441a(a)(14)(B)(viii) was to develop policies and documentation to provide a basis for later *government review* of RTC disposition activities. *See* H.R.Rep. 101-54, 101st Cong., 1st Sess., pt. 1, at 358, 361. Further, the Act expressly prohibits judicial review of claims seeking determination of a party's

rights with respect to any acts or omissions by the agency as receiver unless those acts are covered under the procedures, discussed *supra*, for creditor claims.[3] 12 U.S.C. § 1821(d)(13)(D)(ii). Accordingly, the Court will dismiss Count Three for failure to state a claim upon which relief may be granted.

II.

On April 18, 1995, Brown filed a *lis pendens* in the Circuit Court of Loudoun County, Virginia, on the property at issue in this suit. Defendant has filed a motion requesting the Court to direct Brown to remove the *lis pendens*, arguing that when, as here, the dispute over property involves money damages rather than a title dispute, *lis pendens* is improper.[4] While defendant may be correct, the Court cannot imagine why defendant chose to file this motion in district court in the District of Columbia.

---

[3] 12 U.S.C. § 1821(d)(13)(D)(ii) provides that:

> Except as otherwise provided in this subsection, no court shall have jurisidction over --
>
> (i) any claim or action for payment seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed as receiver, including assets which the Corportion may acquire from itself as such receiver; or
>
> (ii) any claim relating to any actio or omission of such institution or the Corporation as receiver.

[4] In Virginia, a *lis pendens* serves as notice to third parties that there is litigation that may affect title to property. 12A Mitchie's Jurisprudence of Va. & W.V., § 2 at 390.

Brown filed the *lis pendens* in state court in Virginia. The property at issue is located in Virginia. CMF, the title-holder, is not a party to this action. As the court does not have jurisdiction over this issue, the Court must deny the motion.

CONCLUSION

The Court will grant defendant's motion to dismiss the complaint and deny defendant's motion for removal of *lis pendens*. An Order consistent with the conclusions in this Memorandum Opinion will issue on this date.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Dated: February 14, 1996

APPENDIX 5

12 U.S.C. § 1441a(a)(14)

(14) Strategic plan for Corporation operations

(A) In general

The chief executive officer of the Corporation is authorized to implement the strategic plan for conducting the Corporation's functions and activities submitted by the former Oversight Board to the Congress, dated December 31, 1989.

(B) Provisions of plan

The strategic plan and implementing policies and procedures required under the paragraph shall at a minimum contain the following:

(i) Factors the Corporation shall consider in deciding the order in which failed institutions or categories of failed institutions will be resolved.

(ii) Standards the Corporation shall use to select the appropriate resolution action for a failed institution.

(iii) With respect to assisted acquisitions, factors the Corporation shall consider in deciding whether nonperforming assets of the failed institution will be transferred to the acquiring institution rather than retained by the Corporation for management and disposal.

(iv) Plans for the disposition of assets.

(v) Management objectives by which the Corporation's progress in carrying out its duties under this section can be measured.

(vi) A plan for the organizational structure and staffing of the Corporation, including an assessment of the extent to which the Corporation will perform asset management functions and other duties through contracts with public and private entities.

(vii) Consideration of whether incentives should be included in asset management functions and other duties through contracts with public and private entities.

(viii) Standards for adequate competition and fair and consistent treatment of offerors.

(ix) Standards that prohibit discrimination on the basis of race, sex, or ethnic group in the solicitation and consideration of offers.

(x) Procedures for the active solicitation of offers from minorities and women.

(xi) Procedures requiring that unsuccessful offerors be notified in writing of the decision within 30 days after the offer has been rejected.

(xii) Procedures for establishing the market value of assets based upon standard market analysis, valuation, and appraisal practices.

(xiii) Procedures requiring the timely evaluation of purchase offers for an institution.

(xiv) Procedures for bulk sales and auction marketing of assets.

(xv) Guidelines for determining if the value of an asset has decreased so that no reasonable recovery is anticipated. In such cases, the Corporation may consider potential public uses of such asset including providing housing for lower income families (including the homeless), day care centers for the children of low and moderate-income families, or such other public purpose designated by the Secretary of Housing and Urban Development.

(xvi) Guidelines for the conveyance of assets to units of general local government, States, and public agencies designated by a unit of general local government or a State, for use in connection with urban homesteading programs approved by the Secretary of Housing and Urban Development under section 1706e of this title.

(xvii) Policies and procedures for avoiding political favoritism and undue influence in contracts and decisions made by the Thrift Depositor Protection Oversight Board and the Corporation.

APPENDIX 6

12 U.S.C. § 1821(d)(6)(A)

(6) **Provision for agency review or judicial determination of claims**

(A) In general

Before the end of the 60-day period beginning on the earlier of —

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i).

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(13)

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall —

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of

any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) Any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which —

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination of the basis of race, sex or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low and moderate-income individuals.

(2)

Supreme Court, U.S.
FILED
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No. 96-1921

In the Supreme Court of the United States

OCTOBER TERM, 1996

SIDNEY J. BROWN, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners lacked standing to pursue their claims for declaratory relief and lost profits in this proceeding.

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FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-8) is unreported, but the decision is noted at 106 F.3d 442 (Table). The opinion of the district court (Pet. App. 4, at 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1997. A petition for rehearing was denied on March 4, 1997. Pet. App. 2. The petition for a writ of certiorari was filed on May 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, petitioner Nattchase Associates Limited Partnership, of which petitioners Brown and Bernstein are general partners, borrowed $36 million dollars from San Jacinto Savings Association, securing the loan with a non-recourse promissory note and a deed of trust on real property located in Loudoun County, Virginia. Pet. App. 3, at 4-5 & n.1. Petitioners began to default on the loan in 1989. *Id.* at 5. By March 1993, the arrearages amounted to more than $14 million in interest alone. FDIC C.A. Br. 6.

In 1990, San Jacinto was declared insolvent and the Resolution Trust Corporation (RTC) was appointed to act as its receiver.[1] Pet. App. 1, at 4. In liquidating San Jacinto's assets, see 12 U.S.C. 1821(d)(2), the RTC included petitioners' note in a pool of non-performing loans packaged together for sale. Pet. App. 1, at 4. The RTC informed prospective bidders that defaulting borrowers or their affiliates would not be permitted to bid unless they first settled their obligations with the RTC, and gave instructions for contacting the RTC to arrange a settlement. FDIC C.A. Br. 6. Petitioners did not settle their defaulted obligations before the sale. Bidding was conducted between March and May 1993, and in July the RTC sold the loan pool containing petitioners' note to CMF Loudoun, L.P. (CMF), realizing approximately $5 million on petitioners' $36 million note. Pet. App. 3, at 5; Pet. App. 4, at 3.

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[1] On December 31, 1995, the RTC's existence terminated by operation of law and the Federal Deposit Insurance Corporation succeeded to its responsibilities. See 12 U.S.C. 1441a(m). The FDIC has continued this litigation as successor to the RTC.

2. When CMF sought to foreclose on petitioners' note, petitioners sued CMF and the RTC in federal court in Virginia, alleging that the RTC had wrongfully deprived them of the opportunity to bid on the note. As relief, petitioners sought a declaration that the bidding procedures were unconstitutional, rescission of the sale, an injunction prohibiting foreclosure and requiring a new auction, and related damages. Pet. App. 3, at 5-6. The district court dismissed petitioners' suit. *Id.* at 6.

On appeal, the Fourth Circuit held (Pet. App. 3, at 10-11) that petitioners' request for an order rescinding the sale to CMF was barred by 12 U.S.C. 1821(j), which generally prohibits courts from taking "any action * * * to restrain or affect the exercise of powers or functions of the [RTC or FDIC] as a conservator or a receiver." With respect to petitioners' request for declaratory and monetary relief, the court held that the RTC had acted within its statutory authority in transferring petitioners' note to CMF (Pet. App. 3, at 7), and that petitioners were required to exhaust the administrative remedies provided by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, before seeking judicial review. Pet. App. 3, at 6-9. The court of appeals modified the district court's order to make clear that dismissal of the declaratory and monetary claims was without prejudice to the pursuit of those claims within the structure mandated by FIRREA. *Id.* at 9.

Petitioners sought this Court's review of the denial of equitable relief enjoining the sale of the Nattchase loan to CMF. They did not appeal the portion of the court's decision that required exhaustion of their

other claims. See RTC Br. in Opp. at 5 & n.1, No. 94-885. This Court denied review. 513 U.S. 1147 (1995).

3. Petitioners then filed an administrative claim, which the RTC denied in its entirety. See Pet. App. 1, at 5. They then filed this action seeking judicial determination of their claims. See 12 U.S.C. 1821(d)(6)(A). The complaint sought a declaration that the sale to CMF was unlawful, damages for an uncompensated deprivation of property, and damages for wrongful exclusion of petitioners from bidding on the notes on which they had defaulted. See Pet. App. 1, at 5-6.

The district court dismissed petitioners' suit. Pet. App. 4, at 1-10. The court held that petitioners' request for a judgment declaring the CMF sale void was precluded by the Fourth Circuit's previous decision holding that the transfer of assets to CMF was within the RTC's statutory authority. *Id.* at 6. It dismissed as "utterly without merit" (*ibid.*) petitioners' claim that their property had been taken without compensation—a claim that petitioners abandoned in the court of appeals (Pet. App. 1, at 6 n.3) and do not renew here (Pet. 10 n.4). Finally, the court rejected petitioners' "central" claim for damages based on wrongful exclusion from the bidding process (*id.* at 7), holding that no provision of law required the RTC to allow particular parties to bid on thrift properties, and that Congress had committed the selection of bidders largely to the agency's discretion. *Ibid.* In addition, the court held that petitioners lacked standing to pursue a "right to bid" claim against the RTC. *Id.* at 8.

4. The court of appeals affirmed. Pet. App. 1, at 1-8. Without reaching the merits, the court held that petitioners lacked standing to maintain the suit because

they could not obtain redress either on their claim for declaratory relief or on their claim for damages for wrongful exclusion. *Id.* at 6. On the first point, the court held that petitioners' request for "a 'declaratory' judgment that 'the sale of the notes to CMF was illegal, null and void'" was essentially the same as the claim for rescission that the Fourth Circuit had previously held was barred by 12 U.S.C. 1821(j). Pet. App. 1, at 6-7 & n.5. Having been litigated and determined in the prior proceedings, the claim was res judicata and could not be relitigated in this proceeding. *Id.* at 7. With regard to the damages claim, the court held that any losses stemming from petitioners' initial investment were caused by the failure of that investment and petitioners' own default, not by any act of the RTC, while any claim for lost profits was, in the context of this case, "simply too speculative" to confer standing on petitioners. *Id.* at 7-8.

ARGUMENT

1. Petitioners argue (Pet. 15-17) that the court of appeals should not have invoked the doctrine of res judicata in this case because the Fourth Circuit expressly provided that dismissal of the claims in petitioners' earlier action would be without prejudice. As the court below explicitly noted, however, while the Fourth Circuit did order that most of petitioners' earlier claims be dismissed without prejudice, it affirmed the dismissal *with* prejudice of their claim for an order rescinding the RTC's sale of the Nattchase note to CMF. Pet. App. 1, at 4-5;[2] see *id.* at 6-7; Pet.

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[2] The version of the court's opinion reprinted in the appendix to the petition omits a portion of the relevant text. See Pet. App. 1, at 4-5. The full passage reads:

App. 3, at 9-11. In this case, the court of appeals correctly recognized that petitioners' present request for "a 'declaratory' judgment that 'the sale of the notes to CMF was illegal, null and void'" was functionally equivalent to their previous claim seeking "a '[j]udgment declaring the [RTC's] bid process * * * to be void, unenforceable, and rescinded." Pet. App. 1, at 6, 7 n.5 (quoting the complaint in petitioners' first suit); compare *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982) ("[T]here is little practical difference between injunctive and declaratory relief."). Because the latter claim was fully litigated and determined on the merits in the Fourth Circuit proceedings, see Pet. App. 3, at 10-11, the court below properly declined to entertain it a second time.

2. Petitioners contend (Pet. 17-19) that the court of appeals erred in concluding that their monetary claims were too speculative to confer standing to sue.[3] The court acted well within its discretion, however, in concluding that the complaint's allegation of a "loss of * * * opportunities" (Pet. App. 1, at 7),

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On appeal the Fourth Circuit modified the district court's ruling to reflect dismissal *without prejudice* of most of the claims against the RTC, pending exhaustion of administrative remedies under 12 U.S.C. § 1821(d)(6)(A) and 1821(d)(13)(D)(ii). The court affirmed *with prejudice*, however, dismissal of the general partners' claim for "requested injunctive relief, rescission of the contract of sale between RTC and CMF for the note," concluding such relief was "barred by 12 U.S.C.A. § 1821(j)."

[3] Petitioners do not contest the court's separate holding that any damages attributable to their own initial investment and subsequent default "were not caused by the allegedly wrongful exclusion from bidding and therefore cannot confer standing to sue [the] RTC." Pet. App. 1, at 7 (footnote omitted).

which would require purported proof of "profits the partnership might have realized had it successfully bid on, purchased and developed the property" (*id.* at 7-8), did not specify a sufficiently concrete or demonstrable injury to permit petitioners to invoke the power of a federal court.[4] See generally *Allen* v. *Wright*, 468 U.S. 737, 750-752 (1984); *United Transp. Union* v. *ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990). Nothing in *United States* v. *Winstar Corp.*, 116 S. Ct. 2432 (1996), which dealt with the enforcement of government contracts, is to the contrary (see Pet. 18), or sheds any light on the issues in this case.

3. Petitioners argue (Pet. 19-22) that they should be accorded a private right of action to enforce the provisions of 12 U.S.C. 1441a(a)(14)(B), which deals with the general contents of the "strategic plan" for conducting the RTC's activities that was developed and submitted to Congress by the former Thrift Depositor Protection Oversight Board. See also Pet. 20 n.11, 22 (also mentioning 12 U.S.C. 1821(d)(13)(E), which sets standards for asset dispositions, and 12

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[4] At oral argument (see Pet. App. 1, at 7 n.6) and in their petition (at 19 n.9), petitioners have attempted to add some degree of specificity to their damage claim by suggesting that they incurred expenses in preparing a bid that they were not allowed to make. Aside from the fact that petitioners were surely on notice that they would not be permitted to bid unless they first settled with the RTC their defaulted debt to the failed thrift (see page 2, *supra*), and therefore made any investment in "bid preparation" solely at their own risk, petitioners neither alleged such expenses in their complaint nor referred to them in their appellate briefs. See Pet. App. 1, at 7 n.6. Petitioners cite nothing in the record to support their assertion to the contrary (Pet. 19 n.9).

U.S.C. 1441a(f), which explicitly *prohibits* the sale of assets to individuals who, like petitioners, have defaulted on obligations owed to a failed institution). The district court correctly rejected that contention. Pet. App. 4, at 8-9; see also Pet. App. 1, at 6 n.4.

There is no indication that Congress implicitly intended to provide a right of action for bidders excluded from an RTC auction—particularly bidders whose participation Congress specifically prohibited. To the contrary, Congress gave the RTC broad authority to liquidate the assets of failed institutions for distribution to creditors, including the express power to transfer assets unimpeded by any claim. See, *e.g.*, 12 U.S.C. 1821(d)(2)(B), (E), (G)(i)(II), and (J)(ii).[5] Moreover, the statute provides a comprehensive and exclusive remedial scheme, involving both administrative and judicial review, for persons wishing to assert claims against a failed institution or against the RTC as receiver. See 12 U.S.C. 1821(d)(5) and (13)(D). Under these circumstances, there would be no justification for inferring any unexpressed congressional intention to allow additional direct private litigation. See generally *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16, 19-24 (1979); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

4. Finally, petitioners argue (Pet. 23-27) that they have been denied due process by being left "entirely without a remedy" (Pet. 23). That is incorrect. After the Fourth Circuit correctly held that 12 U.S.C. 1821(j) barred them from attempting to rescind the

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[5] The legislative history indicates that the RTC was to be given the power to take all actions necessary to resolve the thrift crisis, and that it was intended to act expeditiously. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 307 (1989).

sale to CMF, petitioners were entitled to seek damages or other appropriate relief under the administrative claims process, followed by judicial review. 12 U.S.C. 1821(d)(5). They did so, and received full review of their claims at the administrative level. It is true that when they then sought judicial review, in this proceeding, they were unable to prevail (or even, in the court of appeals' view, to allege any relevant injury sufficiently concrete to allow them to proceed). But that result flows from the strong prohibitory force of Section 1821(j), which precludes rescission of the sale (or the equivalent declaratory judgment that petitioners sought here), and from the fact that their damage claim is completely without merit.[6]

Petitioners have not been denied a forum: They have merely failed to state any claim on which they are entitled to redress. Compare *National Trust for Historic Preservation* v. *FDIC*, 21 F.3d 469 (D.C. Cir.), reinstating in part 995 F.2d 238, 239 (D.C. Cir.

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[6] It is instructive to recall that petitioners borrowed $36 million from a federally insured savings and loan association, and then defaulted on the loan. By the time the thrift had failed and the federal receiver sought to sell the loan, petitioners owed more than $14 million in unpaid interest alone, and the receiver was able to realize only some $5 million by petitioners' note and deed of trust. See pages 2-3, *supra*. Petitioners' argument that they were wrongfully excluded from bidding on the note amounts to a claim that they were somehow entitled to a chance to retire their own defaulted debt for pennies on the dollar, in the process extinguishing the lien on the underlying property. Compare 12 U.S.C. 1441a(f)(1)(A)(i) ("The [RTC] shall * * * prohibit the sale of assets of a failed institution * * * to any person who * * * has defaulted * * * on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution.").

1993), cert. denied, 513 U.S. 1065 (1994). That is not a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States
October Term, 1996

Sidney J. Brown, *et al.*,
Petitioners,
v.
Resolution Trust Corporation,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

Respondent's Brief in Opposition ("Respondent's Brief") does not dispute the legal significance of this case or the grounds for review by this Court. Respondent's Brief does, however, distort material facts and make misleading references to clearly inapplicable statutory provisions in a blatant attempt to prejudice this Court against Brown's Petition and to mask the important questions of first impression which should be reviewed and settled by this Court.

II. RESPONDENT DISTORTS THE FACTS OF THIS CASE

A. Brown Never Received A "Loan" Or Any Other Money From Respondents

On June 20, 1988, Petitioner Nattchase Associates Limited Partnership ("Nattchase") purchased from Respondent Sajacito two parcels of property (the "Properties") that Sajacito owned for a price of $45 million. Nattchase paid $9 million in cash at settlement, plus closing costs, and financed the balance of the purchase price with a $36 million deferred purchase money note and deed of trust (the "Nattchase note") provided by Sajacito, which was wholly owned by Respondent San Jacinto. Neither Sajacito or San Jacinto ever forwarded any monies to Nattchase or any of the other Petitioners. Thus, contrary to Respondent's statements in its Brief, Brown did not borrow $36 million from San Jacinto. See Respondent's Brief at 2.

B. Brown Contests All Of The Court's Holdings Regarding Brown's Damage Allegations

Next, Respondent states that, "Petitioners do not contest the court's separate holding that any damages attributable to their own initial investment and subsequent default 'were not caused by the allegedly wrongful exclusion from bidding and therefore cannot confer standing to sue [the] RTC.'" Respondent's Brief at 6, n. 3. This simply is not true. Brown certainly contests the D.C. Circuit's dicta regarding the cause of his damages. However, because the basis of the D.C. Circuit's denial of Brown's appeal was its incorrect ruling that Brown's monetary claims were too speculative to confer standing, Brown addressed his Petition to this erroneous holding and not the court's dicta.

III. RESPONDENT MAKES MISLEADING REFERENCES TO IRRELEVANT STATUTORY PROVISIONS

On page 8 of its Brief, and again on page 9 in footnote 6, Respondent asserts that 12 U.S.C. 1441a(f)(1)(A)(i) prohibits individuals like Brown from bidding on RTC assets. Petitioner's reference to this statutory provision is a patent diversionary tactic and should be ignored by this Court. Section 1441a(f)(1)(A) has no application to Brown and Respondent knows it. Section 1441a(f)(1)(A)

states in its entirety:

> (1) The Corporation shall prescribe regulations to prohibit the sale of assets of a failed institution by the Corporation to any person who -
>
> > (A)(i) has defaulted, or was a member of a partnership or an officer or director of a corporation which has defaulted, on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution;
> >
> > (ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and
> >
> > (iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation or from any institution subject to the jurisdiction of the Corporation pursuant to paragraph (3)(A). (Emphasis supplied).

12 U.S.C. § 1441a(f)(1)(A). This provision is written in the conjunctive; accordingly each of the three predicates must exist for it to be applicable. Dispositively, no one, not the RTC, FDIC or any other federal or state agency, has ever even accused Brown of engaging in fraudulent activity, much less "found" him to have done so. Thus, § 1441a(f)(1)(A) has absolutely no application to Brown and Respondent's reference to it was in conscious disregard of this fact.

IV. CONCLUSION

For the reasons set forth above and in Brown's Petition For Writ Of Certiorari, Brown respectfully requests that this Court grant his Petition.

Respectfully submitted,

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